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Wills - Lost Revoking Instrument

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WILLS—LOST REVOKING INSTRUMENT—Oral testimony of a lost revoking instrument is not admissible to defeat an existing valid will. A revoking "other writing" must be executed and proved in the manner required by the Wills Act.

Leonard Estate, 427 Pa. 363, 234 A.2d 856 (1967).

The decedent executed three wills during his life, the last being within thirty days of his death. The first and third contained charitable dispositions, and were in existence at testator's death. The second, which also contained charitable dispositions, had been revoked by its destruction. The statutory mandates of a charitable bequest under Wills Act of 1947[1] are: the gift shall be valid unless the will is executed within thirty days of death and when executed within that period it shall be valid (1) if all those who are to benefit by the gift's invalidity agree to its validity, or (2) if the will executed within the thirty day period shall revoke or supersede a prior will executed more than thirty days prior to death, the original of which can be produced containing an "identical gift for substantially the same religious or charitable purpose."[2] Various charitable institutions successfully claimed that the dispositions in the first and third will, which standing together met the second basis for validation under the Wills Act. It was conceded that the gifts were identical and for substantially the same purpose. The heirs at law, however, claimed that the second (destroyed) will contained a clause revoking the first will and that the first will did not thus serve as a prior will superseded by the last will executed within thirty days of testator's death. If the second will could be shown to contain such a revoking clause the charitable gifts would fail.[3] The issue thus presented to the Supreme Court of

1. PA. STAT. ANN. tit. 20, § 180.7(1) (1947).

Death Within Thirty Days; Religious and Charitable Gifts. Any bequest or devise for religious or charitable purpose included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid. The thirty day period shall be so computed as to include the day on which the will or codicil is written and to exclude the day of death. Unless the testator directs otherwise, if such a will or codicil executed at least thirty days before testator's death and not theretofore revoked or superseded and the original of which can be produced in legible condition, and the original shall contain an identical gift for substantially the same religious or charitable purpose, the gift in the later will or codicil shall be valid; or if each instrument shall give for substantially the same religious or charitable purpose a cash legacy or a share or the residuary estate or share of the same asset, payable immediately or subject to identical prior estates and conditions the later gift shall be valid to the extent to which it shall not exceed the prior gift.

2. Leonard Estate, 427 Pa. 364, 366, 234 A.2d 856, 858 (1967).

Pennsylvania was whether the appellant heirs should be permitted to prove, by oral testimony, that the second will contained a clause revoking the first will.

Relying on *Shetter's Estate*[4] and *Koehler's Estate*[5] the court held: "Oral testimony alone that the (first) will . . . was revoked by an alleged (second) will . . . is not sufficient to prove revocation and such evidence is not admissible."[6] The policy of excluding such evidence is based upon the fear that oral testimony would be so easy to procure as to reflect seriously upon the stability of valid existing wills.[7] This policy is effectuated by the requirement of some "other writing" signed and proved in accordance with the Wills Act. However, a series of cases dealing with this problem indicates a somewhat less than full enforcement of the policy when the evidence is secure of the "machinations of the designing and corrupt."[8] Thus, where the evidence to establish revocation is composed of something more than mere oral testimony, *i.e.*, documented proof, it may be admissible due to the belief that a writing is more trustworthy than simple oral testimony.

In *Shetter*, testator executed a valid will with various charitable dispositions. A later second will, revoking the first, was itself revoked by destruction. A codicil was then executed republishing the first will. The validity of the execution of the codicil was questioned. The appellant contended the first will was revoked by the second and that the codicil was insufficient to reinstate the first will. Rejecting this argument the Supreme Court stated: "It cannot be shown by oral testimony alone that a will has been revoked. A writing declaring its revocation must be produced, *signed* by the decedent, before an earlier will can be rendered nugatory" (emphasis added).[9] Because no "other writing" was produced declaring revocation, as required by the Wills Act of 1917, the first will was operative. The exact weight of the *Shetter* precedent of itself is questionable for the court also based the holding on the proposition that the first will was reinstated by the codicil irrespective of the second will. Reaffirming *Shetter's Estate, Koehler's Estate* held that a lost revoking will could not be proven by oral testimony in order to defeat an existing valid will. This

3. Revocation in Pennsylvania is not ambulatory but is effective immediately upon the execution of the later instrument. *See* P. BREGY, INTESTATE, WILLS AND ESTATES ACT OF 1947, at 2357, and Burtt Will, 353 Pa. 217, 44 A.2d 670 (1945).

4. 303 Pa. 193, 154 A. 288 (1931).

5. 316 Pa. 321, 175 A. 424 (1934). *See also* P. BREGY, INTESTATE, WILLS AND ESTATES ACT OF 1947, at 2313, 8039, pointing out the questionable status of *Koehler's Estate* which was reaffirmed in *Leonard Estate*.

6. Leonard Estate, 427 Pa. 363, 367, 234 A.2d 856, 858 (1967). This was a unanimous decision written by Mr. Justice Jones.

7. Harrison's Estate, 316 Pa. 15, 20, 173 A. 407, 409 (1934).

8. *Id.*

9. 303 Pa. at 197, 154 A. at 289.

case was not complicated by a republishing codicil as in *Shetter*; rather, it was a direct holding proscribing oral testimony of revocation. The basis of this holding was section 20 of the Wills Act of 1917. This section is similar to section 5 of the present Wills Act, in form and content, and did not require the court in *Leonard Estate* to make and distinction between them.[10] Both acts require some "other writing" declaring revocation, executed and proved in the manner provided in the Wills Act.

A possible move away from the *Shetter* and *Koehler* position was seen in *Burtt Will*[11] with the opinion written by Mr. Justice Stearne with Justices Linn and Patterson dissenting. This controversy centered on what requirements another writing had to meet in order to show revocation of a prior will. In *Burtt* testator had a prior, properly executed will in existence and a subsequent will upon which he had obliterated his signature. Although the question before the Supreme Court was one of revival by cancellation of a later revoking will this question necessarily presupposed that the will with the obliterated signature constituted some "other writing." Holding that the second instrument constituted another writing the court cited *Ford's Estate*[12] as construing section 20 of the

10. Law of June 7, 1917, No. 190 (repealed 1947).

> No will in writing, concerning any real estate, therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed or proved in the manner hereinbefore provided; or by burning, cancelling, obliterating, or destroying the same by the testator himself, or by someone in his presence and by his express direction. (b) No will in writing concerning any personal estate shall be repealed, nor shall any bequest or direction therein be altered, otherwise thus as hereinbefore provided in the case of real estate. . . .

PA. STAT. ANN. tit. 20, § 180.5 (1947).

> No will or codicil in writing or any part thereof can be revoked or altered otherwise than:
>
> (1) Will or codicil. By some other will or codicil in writing.
>
> (2) Other Writing. By some other writing declaring the same, executed and proved in the manner required of Wills, or,
>
> (3) Act of the document. By being burnt, canceled, obliterated, or destroyed with the intent and for the purpose of revocation, by the testator himself or by another person in his presence and by his express direction. If such act is done by any person other than the testator, the direction of the testator must be proved by oaths or affirmations by two competent witnesses.

P. BREGY, INTESTATE, WILLS AND ESTATES ACT OF 1947, at 2352. "The present provision enumerates substantially the same modes of revocation that have been in our statutes since the Act of 1833, P.L. 249."

11. 353 Pa. 217, 44 A.2d 670 (1945).

12. 301 Pa. 183, 195, 151 A. 814 (1930). In *Ford's Estate* the last will of the testator was partly torn by himself and the completion of the tearing was requested by another in his presence and at his express direction. The court held: "The statute . . . opens the door to 'other writings,' and does not say this 'other writing' may not be an effective will, so long at it appears, as it does here, that the testator signed it." Dissenting, Mr. Chief Justice Moschzisker, stated an "other writing" must possess the essential characteristics of a testamentary document. A will which is torn up does not meet such a test.

Wills Act of 1917 and held an unprobatable will, signed by the testator, is "another writing" within the Act.[13]

Mr. Justice Linn, dissenting stated that *Burtt* was to be distinguished from *Ford* in that in *Ford* there was a signed "other writing." Linn's dissent stated that when the revoking instrument is not a will but some "other writing" it still must be signed and proved in the manner required by the Wills Act.[14] Continuing, Justice Linn stated: "The Court now decides, as I understand it, that revocation may be shown by oral evidence."[15] Dissenting with Mr. Justice Linn, Mr. Justice Patterson pointed out that destruction of a signature renders a will incapable of being proved in the same manner as destruction of the entire instrument renders it incapable of being proved.

In *Forish's Will*,[16] decided by the Orphans Court of Schuykill County, the facts were similar to *Burtt Will*. In *Forish* the subsequent revoking will could not be found at the death of the testator. The only evidence of the executed subsequent will was a copy kept by the testator's attorney in his files. In *Burtt* the original of the subsequent will was in existence with the signature obliterated. The petitioner in *Forish* conceded the subsequent will which could not be found, raised the presumption of revocation but he did allege that the copy constituted a revocation of the prior will and thus that the decedent died intestate. Secretaries of the attorney testified that the copy was exact, that the testator had signed it, and that they had subscribed to the will. The court after quoting section 5 of the 1947 Wills Act stated the question to be whether the first will was revoked by some other will in writing.[17] It was held that proof of revocation by a non-probatable will is admissible. The lower court in *Leonard Estate* stated *Forish* did not follow the law of the Supreme Court.[18]

13. 353 Pa. at 229, 44 A.2d at 672.

14. *Id.* at 233, 44 A.2d at 678.

15. *Id.* at 234, 44 A.2d at 678.

16. 40 D & C 2d 15 (1966).

17. *Id.* at 18. One may immediately take issue with this presentation of the question for an unexecuted copy is not a will in writing. It would seem that if the revocation by the second will was to uphold at all, it would be by some "other writing." Hodgson's Estate, 270 Pa. 210, 112 A. 778 (1921) is cited in *Forish* as giving the requisites for proving a lost will which are:

(1) the burden rests on the proponent;

(2) two witnesses must prove the contents of the lost will substantially as set forth in the copy offered for probate;

(3) each witness must be competent as to the execution and contents without aid from the other.

18. Record at 65a. *See* Ervisn's Estate, 427 Pa. 64, 233 A.2d 887 (1967), which held that a conformed but unsigned copy of a lost will can be used to avoid intestacy when the presumption of revocation could be overcome with evidence which is "positive, clear and satisfactory." It should be noted that in this case there were no other previous wills existing which were valid on their face. The use of the above rule is merely to avoid intestacy. *See* Foster's Appeal, 87 Pa. 67 (1878); Glockner v. Glockner, 263 Pa. 393, 106 A. 731 (1919).

The majority of jurisdictions hold that a lost will containing a clause of revocation may be established by oral testimony.[19] This is based upon the theory that the lost will with the revoking clause prevents any prior will from having force. These jurisdictions require, however, different degrees and elements of proof in order to establish the lost will as a revoking instrument, but generally these requirements may be divided into three classes: (1) proof of contents; (2) proof of revoking clause; and (3) proof of execution.[20] California has held that even if the lost will contains a clause of revocation the contents must be proven.[21] This position is based upon their Probate Code which states: "No will shall be proven as a lost will . . . unless its provisions are distinctly and clearly proved by at least two credible witnesses."[22] Contra to California, Minnesota holds it sufficient that a later will which is executed containing a revoking clause be proven.[23] The Alabama Supreme Court has held that the mere proof of execution was sufficient to operate as revocation of a first will.[24] Of the three views, Minnesota is the most popular.[25]

In *Leonard Estate* the second will was destroyed and thus it was a case of pure oral evidence seeking to establish the revocation. The court adhered strictly to the precedent set in *Shetter* and *Koehler* that no oral evidence was admissible to show revocation of a valid existing will. It is significant that the court did not restate its *Shetter* position that a writing must be produced and signed in accordance with the Wills Act. Distinctions between an original will with the signature obliterated as in *Burtt*, an unexecuted copy in *Forish*, and pure oral evidence in *Shetter* and *Koehler* is obvious in light of the rule's fraud preventive purpose. The degree to which fraud is mitigated may determine the court's readiness to admit other written evidence. It is suggested that the rule as to pure oral testimony be retained as the only effective way of preventing disappointed beneficiaries from contesting wills valid on their face. As to other instruments such as those in *Burtt* and *Forish* either the statutory mandate should be enforced to the letter, to wit: executed or proved in the manner required by the Wills Act; or the statutory mandate should be reformed as to enable a more flexible rule of evidence to establish revocation.

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19. Driver v. Sheffield, 221 Ga. 316, 85 S.E.2d 766 (1955). Brackenridge v. Roberts, 114 Tex. 418, 270 S.W. 1001 (1925). *In re* Rokofshy, 111 N.Y.S.2d 533 (1952).

20. 2 W. BOWE-D. PARKER: PAGE ON WILLS § 21.48 (1960).

21. *In re* Ruben's Estate, 36 Cal. Rptr. 752 (1964).

22. CAL. PROB. CODE § 350 (West, 1956).

23. *In re* Cunninghan, 38 Minn. 169, 36 N.W. 269 (1888). Cited with approval in *In re* Anthony's Estate, 265 Minn. 369, 121 N.W.2d 772, 778 (1962).

24. Bruce v. Sierra, 175 Ala. 517, 57 So. 709 (1912).

25. *Supra* note 20, at n.8. Wallis v. Wallis, 114 Mass. 510 (1874). Estate of Laege, 180 Wis. 32, 192 N.W. 373 (1923). Brackenridge v. Roberts, 114 Tex. 418, 270 S.W. 1001 (1925).